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NO._____

In the

Supreme Court of the United States

October Term, 1997

EUGENE M. HARRINGTON; MARTIN LEVY;
AND THOMAS KLEVEN,
Petitioners

v.

WILLIAM H. HARRIS, ET AL.,
JAMES M. DOUGLAS; CALIPH JOHNSON;
AND TEXAS SOUTHERN UNIVERSITY
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Beatrice Mladenka-Fowler
Counsel of Record
Mladenka-Fowler & Adams
1529 Heights Boulevard
Houston, TX 77008-4218
(713) 862-7349
(713) 862-2979 FAX

J. Patrick Wiseman
Wiseman, Durst,
Tuddenham & Owen
1004 West Avenue
Austin, TX 78701
(512) 479-5017
(512) 479-0409 FAX

Attorneys for Petitioners

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I

QUESTIONS PRESENTED

1. May the State punitively sanction public employees for engaging in speech protected by the First Amendment by discriminating in the salaries these employees are paid?

2. May a public employer deny or reduce otherwise deserved and entitled merit raises in retaliation for public employees' exercise of free speech rights protected by the First Amendment?

3. Is the Court of Appeals' finding that the denial or reduction of earned merit raises in retaliation for public employees' exercise of protected speech is not an actionable First Amendment violation inconsistent with this Court's finding in *Rutan v. Republican Party of Illinois* that denials of promotions, transfers, recalls and hiring in retaliation for the exercise of free speech rights did rise to the level of a Constitutional violation?

II

PARTIES TO THIS PROCEEDING

Plaintiffs in the District Court:

Eugene M. Harrington
Martin Levy
Thomas Kleven

Defendants in the District Court:

James M. Douglas
Caliph Johnson
Texas Southern University
William H. Harris
Bobby Wilson

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Eugene M. Harrington, Martin Levy and Thomas Kleven respectfully request this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the opinion of that Court which was entered on July 21, 1997 in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 118 F.3d 359 (5th Cir. 1997) and is reprinted as Appendix A hereto.

The opinion of the United States Court of Appeals for the Fifth Circuit reported at 108 F.3d 598, which was withdrawn and superseded by the opinion reported at 118 F.3d 359, is reprinted as Appendix B hereto.

The District Court Final Judgment was not reported, but is reprinted as Appendix C hereto.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983, the petitioners brought this suit in the Southern District of Texas. On March 3, 1995 the Southern District entered judgment in favor of the petitioners.

Respondents appealed, and on March 14, 1997 the Fifth Circuit Court of Appeals entered an opinion reversing the judgment as to the issue of §1983 retaliation under the First Amendment and affirming on the issues of §1981 race discrimination and substantive due process under the Fourteenth Amendment.

Petitioners' Suggestion for Rehearing En Banc was treated as a Petition for Rehearing and the revised opinion was entered on July 21, 1997. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional amendments and federal statutes are as follows:

UNITED STATES CONSTITUTION

AMENDMENT I - Freedom of Religion, Speech and Press; Peaceful Assemblage: Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV - Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

42 U.S.C. § 1983

Civil Action For Deprivation Of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Professors Eugene M. Harrington, Martin Levy and Thomas Kleven, are three white, tenured full professors at a historically Black state supported law school - Thurgood Marshall School of Law at Texas Southern University in Houston, Texas. Professors Harrington, Levy and Kleven complained that they were discriminated against in their salaries and salary increases as compared to their African-American full professor colleagues at Thurgood Marshall School of Law in retaliation for engaging in speech concerning law school governance and accreditation issues, Hispanic representation within the law school student organization, and salary disparities based on race.

The jury found that under Texas Southern University's established merit raise criteria respondent

Douglas awarded Harrington, Levy and Kleven lower merit raises than they were entitled to in retaliation for the exercise of their protected free speech rights. The jury awarded compensatory and punitive damages to petitioners, and the Court entered final judgment on the verdict. Finding the underpayment to be the result of illegal discrimination based on race, retaliation for the exercise of protected speech and the arbitrary and capricious evaluation process, the court also ordered equitable relief for petitioners.

In its initial opinion, subsequently withdrawn, the Court of Appeals assumed that the speech engaged in by the professors was protected speech and that they deserved the merit pay increases which they were denied. Relying on *Dorsett v. Board of Trustees for State Colleges & Universities*, 940 F.2d 121 (5th Cir. 1991)[1], however, the Fifth Circuit decided that the denial of even admittedly deserved merit pay increases will not constitute an adverse employment action for First Amendment purposes. The Court affirmed the jury award of damages in favor of the petitioners for discrimination on the basis of race and the arbitrary and capricious awarding of merit raises, and affirmed the Magistrate Judge's award of equitable relief.

Harrington, Levy and Kleven timely filed a Suggestion for Rehearing En Banc, which was denied but treated as a Petition for Rehearing. On July 21, 1997 the same panel of the Court of Appeals for the Fifth Circuit withdrew its first opinion and entered a revised opinion which again affected only the First Amendment claim.

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[1] At least one district court in the Fifth Circuit has correctly read *Dorsett* as holding that a claim for retaliation of the First Amendment may be supported by any adverse employment action as to which any important condition of employment may qualify. *Wagner v. Texas A&M University*, 939 F. Supp. 1297 (S.D. Tex. 1996). The *Wagner* court correctly read *Dorsett* as determining that there was no protected speech involved in the case. *Id.* at 1313.

In its revised opinion from which this appeal arises the Court of Appeals again presumed that the petitioners' speech involved matters of public concern, and further assumed that the petitioners did indeed qualify for merit pay increases. However, continuing to rely upon its own earlier extension of *Dorsett,* the Court again held that the petitioners do not have an actionable First Amendment claim for the denial of otherwise entitled merit raises. This was so, the panel argued, because the petitioners have received some merit enhancement, even though (1) the raises were less than those awarded to colleagues who were not being sanctioned for free speech activities, and (2) the jury found by a preponderance of the evidence that petitioners were refused full merit raises based upon protected free speech. *Harrington v. Harris,* 118 F.3d 359, 366 (5th Cir. 1997).

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit's Opinion Conflicts With This Court's Holding In *Rutan v. Republican Party of Illinois* And Is Inconsistent With Other Supreme Court Cases.

The Court of Appeals did not disturb the jury's finding that the reason petitioners received lower merit pay raises than their peers was Douglas' retaliation against them for the exercise of their First Amendment rights. Indeed, in upholding the jury's finding of liability in petitioners' substantive due process claim, the Court held that "a jury could reasonably conclude that Johnson and Douglas acted in an arbitrary and capricious manner in their merit pay evaluations." 118 F.3d 359, 368. Since the factual evidence before the jury in regard to petitioners' due process claim was identical to the evidence before it in regard to their

First Amendment claim, the record supports the jury finding that respondent Douglas acted arbitrarily in retaliation against Professors Harrington, Levy and Kleven for the exercise of their First Amendment rights.

Thus the Court of Appeals' characterization of this case as involving "nothing more than a dispute over the quantum of pay increases" (*Id.* at 366) is erroneous. Rather, the issue in this case is whether an actionable First Amendment claim has been presented when the evidence shows that a public employer has denied or reduced deserved merit raises to public employees in retaliation for the exercise of their First Amendment rights.

This Court has always recognized the free speech guarantee of the First Amendment as among the most important of our constitutional protections and has always treated freedom of speech as a preferred right:

> When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, ... we remain mindful of the fact that the latter occupy a preferred position....[T]he right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men'.

Marsh v. Alabama, 326 U.S. 501, 509 (1946).

Speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection. *Connick v. Meyers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 1689 (1983). See also *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, ___U.S.___,

115 S.Ct. 2510, (1995) (the exercise of free speech as a substantive constitutional right is afforded a "presumption of constitutionality").[2]

The Supreme Court has never required an economic harshness test for claims brought under the First Amendment. To the contrary, the concept that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"[3] is premised on the belief by the members of the Continental Congress that "the unfettered interchange of ideas"[4] forms the very basis of a free society.

Moreover, damages have long been presumed for deprivation of constitutional rights, no matter how nominal. See *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 1053-54 (1978).

In the employment context the Supreme Court has clearly and consistently stated that a government employer may not deny employees the benefits of employment so as to infringe their First Amendment rights:

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a

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[2] Speech protected by the First Amendment is given preferred status so that discrimination against speech is presumed to be unconstitutional. *Id.* at p. 2516.

[3] *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 2545 (1989).

[4] *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308 (1957).

> person on a basis that infringes his constitutionally protected interests - ***especially, his interest in freedom of speech.*** For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 [(1958)]. Such interference with constitutional rights is impermissible.

Perry v. Sinderman, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697 (1972)(emphasis added).[5]

More recently, in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75, 110 S.Ct. 2729, 2737 (1990), this Court held that an employee need not have been dismissed, nor have suffered the "substantial equivalent of a dismissal" to have an actionable First Amendment claim. In *Rutan* the Court considered whether denials of promotions, transfers, recalls or hiring decisions involving low-level public employees may constitutionally be based on party affiliation and support. The Court found explicitly that the employer actions complained of were punitive, adversely affected the terms of employment, and chilled the exercise of protected belief and association by public employees:

> Employees who find themselves in dead-end positions due to their political backgrounds

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[5] *See also* 92 S.Ct. at 2697 for a collection of cases in which this principle has been applied in the employment context.

> *are* adversely affected [in the terms of their employment].

Rutan, 497 U.S. at 73, 110 S.Ct. at 2736 (emphasis in original).

> Employees who do not compromise their beliefs stand to lose the considerable **increases in pay** and job satisfaction attendant to promotions,... These are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment.

Id., 497 U.S. at 74, 110 S.Ct. at 2736 (emphasis added).

In rejecting the Seventh Circuit's "substantial equivalent of a dismissal rule" as "unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy" (*Id.*, 497 U.S. at 75, 110 S.Ct. at 2737), this Court also confirmed that the First Amendment protects state employees not only from dismissals but also from ***"even an act of retaliation as trivial as failing to hold a birthday party for a public employee...when intended to punish her for exercising her free speech rights."*** *Rutan*, 497 U.S. at 75-76, n. 8, 110 S.Ct. at 2737-2738, quoting the Circuit Court opinion at 868 F.2d 943, 954, n. 4 (7th Cir. 1989) (emphasis added).

By holding that the denial or reduction of earned merit raises is not actionable, the Fifth Circuit is in direct conflict with the clear import of *Rutan* that the denial of **any** benefit in retaliation for protected speech is an adverse

employment action and is an actionable First Amendment violation.

II.

The Fifth Circuit's Opinion Directly Conflicts With The Fourth Circuit's Decision In *Kim v. Coppin State College* And Conflicts In Principle With Other Circuit Court Decisions.

1. Denials Of Raises Are Actionable In The Fourth Circuit.

The Fourth Circuit has expressly held that the denial of a pay increase for reasons of engaging in protected speech is an actionable adverse employment action. *Kim v. Coppin State College*, 662 F.2d 1055, 1062 (4th Cir. 1981).

In *Kim v. Coppin State College* the plaintiffs alleged that they were denied pay increases for participating in a student boycott. The Fourth Circuit reversed the district court's directed verdict for a determination of whether the speech engaged in by the professors was protected and a substantial factor in the employer's adverse action of denying pay increases, stating that such a denial would entitle the plaintiffs to relief "...for the college's unconstitutional infringement of their rights to free expression." 662 F.2d at 1062.

2. The Fifth Circuit Opinion Conflicts In Principle With Other Circuits.

The general principle in most circuits is that First Amendment claims are to be judged "not in the harshness of the sanctions applied, but in the imposition of any disciplinary action for the exercise of permissible free speech." *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir.

1987). The Second Circuit has held that a public college's creation of a "shadow class" and encouragement of the continued erosion in the size of a professor's class in retaliation for his protected speech was "the antithesis of freedom of expression." *Levin v. Harleston,* 966 F.2d 85 (2nd Cir. 1992). In *Waters v. Chaffin*, the Eleventh Circuit has stated that "the First Amendment is implicated whenever a government employee is disciplined for his speech." 685 F.2d 833, 837 n. 9 (11th Cir. 1982). The Seventh Circuit has held in *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187 (7th Cir. 1995) that retaliation need not be monstrous to be actionable under the First Amendment; it need merely create the potential for chilling employee speech on matters of public concern.

Many circuits, including the Fifth Circuit, have held that employment decisions such as transfers without reduction in pay may constitute violations of First Amendment rights. See, for example, *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114 (1st Cir. 1977) (transfer of social worker without demotion or cut in pay was actionable because it was solely in retaliation for Rosado's speech); *Bernheim v. Litt,* 79 F.3d 318 (2nd Cir. 1996) (teacher's retaliatory reassignment to classroom position resulting in damage to her reputation, opportunities for advancement and earning potential stated legally cognizable harm under the First Amendment); *Robb v. City of Philadelphia*, 733 F.2d 286 (3rd Cir. 1984) (transfer and denial of promotion were "benefit" which could not be denied in retaliation for exercise of First Amendment rights); *Boring v. The Buncombe County Board of Education,* 98 F.3d 1474 (4th Cir. 1996) (transfer with no decrease in pay or benefits provided adequate basis for First Amendment claim); *Fyfe v. Curlee,* 902 F.2d 401 (5th Cir. 1990) *cert. denied* 498 U.S. 940, 111 S.Ct. 346 (1990) (secretary's transfer to less responsible job at same wage in retaliation for sending

daughter to private school violated First Amendment and secretary was entitled to at least nominal damages); *Click v. Copeland,* 970 F.2d 106 (5th Cir. 1992) (transfer of deputies to less desirable jail positions constituted First Amendment retaliation for protected political activities); *Forsyth v. City of Dallas, Tx.*, 91 F.3d 769 (5th Cir. 1996) (transfer from prestigious intelligence unit to night patrol constituted adverse action in retaliation for reporting illegal wiretapping); *Simpson v. Weeks*, 570 F.2d 240 (8th Cir. 1978) *cert. denied* 443 U.S. 911 (transfer to jail and lowered evaluations in retaliation for discussing pending civil rights litigation was actionable under First Amendment); and *McCabe v. Sharrett,* 12 F.3d 1558 (11th Cir. 1994) (transfer to another position with frozen salary because of marriage to a colleague constituted adverse action in violation of First Amendment). Each of these holdings supports a finding that a denial or reduction of an earned merit raise in retaliation for a protected First Amendment right is actionable.

III.

The Fifth Circuit's Opinion Condones Salary Discrimination In Retaliation For The Exercise Of Protected Speech.

The Fifth Circuit assumed that petitioners' speech was protected and that they "actually deserved the merit pay increases of which they complained." *Harrington v. Harris,* 118 F.3d 359, 366 (5th Cir. 1997). In light of the fact that the jury and the trial court found that respondent Douglas had denied petitioners deserved merit increases in retaliation for their exercise of First Amendment rights, the court's finding that "the variations in the amounts or percentages of merit pay increases...actually awarded were not significant" (*Id.*) is no different than the panel's original opinion that the

denial of a deserved merit raise in retaliation for protected speech is not an actionable adverse employment action.

Such a holding, if allowed to stand, would severely undercut the free speech rights of all public employees. Public employers who disapprove of their employees' protected speech could with impunity deny or reduce salary increases for the rest of such employees' careers, leaving the speakers far behind other employees in salary and benefits tied to salaries.[6] Employers could even let it be known that employees who dare to speak out will receive no more salary increases. Such a chilling effect on free speech is untenable.

The Fifth Circuit assumes that a threat of discharge, a demotion, a denial of a promotion or a reduction in pay would each constitute an adverse action. 118 F.3d 359, 366. Public employees rely on the prospect of deserved merit increases every bit as much as on their present salary levels. Likewise, in terms of job satisfaction and employee morale, the distinction between a denial of an increase and a reduction in pay is elusive. As a practical matter, therefore, the chilling effect on speech of the denial of a deserved merit raise is identical to the chilling effect on speech of a reduction in pay.

In addition, if, as the panel states, "reprimands" are adverse employment actions (*Id.* at 365), then the denial of a deserved merit raise in retaliation for protected speech must likewise be actionable, since the withholding of money is likely to have a far greater chilling effect on protected speech than a mere reprimand. There is little difference, as

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[6] In the instant case, the petitioners' salaries at the time of trial were approximately $3,500 to $5,000 per year lower than their comparable colleagues' salaries. T. 11, p. 205.

well, between denial of a promotion and denial of a merit increase.[7] Generally, the reason employees seek promotions is for the accompanying additional pay, a point expressly noted by the Supreme Court in *Rutan, supra.*

As also noted in *Rutan*, it is not necessary that the employment decision be the substantial equivalent of a dismissal. Nevertheless, the denial of deserved merit raises in retaliation for protected speech amounts to such an equivalency. No employee could afford to remain on a job without deserved raises while one's colleagues continue receiving such increases year after year. There would be no choice but to resign and seek employment elsewhere.

Indeed, in the Court of Appeal's revised opinion, the panel apparently concedes that the total denial of merit raises in retaliation for the exercise of First Amendment rights would be actionable:

> If Plaintiffs had received no merit pay increase at all or if the amount of such increase were so small as to be simply a token increase which was out of proportion to the merit pay increases granted to others, we might reach a different conclusion.

Harrington v. Harris, supra, 118 F.3d at 366.

To justify its ruling in this case, however, the Fifth Circuit finds that "the variations in the amounts or percentages of merit pay increases which [Douglas] actually awarded were not significant." *Id.*

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[7] See *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980) (denial of promotion affects an important condition of employment).

It is not correct to say that the merit raise variations in this case "were not significant." The jury found that as a result of respondent Douglas' retaliation against them, petitioners were damaged in lost pay over a four year period in the following amounts: Harrington - $11,263; Levy - $17,521; Kleven - $20,416. Lost wages averaging between $2,500 and $5,000 a year are most certainly significant and are enough to chill the speech of even the most hardy employees.

Nor does the matter end here. For if an employer can escape liability for retaliatory action by awarding disfavored employees significantly lower merit raises than their peers on the basis of the exercise of their protected rights, then that practice could continue year after year, without halt. This would have the cumulative effect over a period of years of a steadily increasing salary differential. This is, in fact, what happened in the instant case.

IV.

The Fifth Circuit's Opinion Conflicts With This Court's And Other Circuit Courts' Findings In Regard To "Nominal Damages."

It is incorrect to state that even relatively small merit pay deprivations in retaliation for the exercise of free speech rights forecloses a First Amendment claim. The First Amendment is too important to allow public employers to escape liability by arguing that the amount of money involved is insignificant. That would enable employers to push the envelope to the limit, and would involve courts in time-consuming and hard-to-resolve factual disputes over what is or is not a significant dollar amount while the far more significant matter of stopping employers from engaging in such retaliatory action would fade into the

background. Moreover, even relatively small differences in pay and merit raises impact employees' reputations and careers, and can therefore chill free speech when the differences are retaliatory, because employees tend to judge their own and their colleagues' competence based on those differentials.

Thus, even if the denial of merit pay was not "significant", the violation of the constitutional right to freedom of speech warrants an award of nominal damages.

> "In an action brought pursuant to Section 1983, 'even when a litigant fails to prove actual compensable injury, he is entitled to an award of nominal damages upon proof of violation of a substantive constitutional right.'" *Gibeau v. Nellis,* 18 F.3d 107, 110 (2d Cir. 1994) (quoting *Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir. 1984), which cites *Carey v. Piphus,* 435 U.S. 247, 267, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252 (1978)). Such an award "is not discretionary where a substantive constitutional right has been violated..." *Gibeau, supra,* 18 F.3d at 110-11.

Bernheim v. Litt, 79 F.3d 318, 326 (2nd Cir. 1996). See also *Fyfe v. Curlee,* 902 F.2d 401, 406 (5th Cir. 1990) *cert. denied* 498 U.S. 940, 111 S.Ct. 346 (1990) (public school secretary whose constitutional rights were violated through her transfer due to her decision to send her daughter to private, all-white school was at least entitled to nominal damages of $1), citing *Memphis Community School District v. Stachura,* 477 U.S. 299, 308 n. 11, 106 S.Ct. 2537, 2543, n. 11, 91 L.Ed.2d 249 (1986); *Carey v. Piphus,*

supra, and *Familias Unidas v. Briscoe,* 619 F.2d 391, 402 (5th Cir. 1980).

The jury and the trial judge in the cause *sub judice* found that the respondents denied the petitioners fair treatment in salaries in retaliation for their protected speech. The Fifth Circuit made no finding to the contrary, and in fact, affirmed the substantive due process claim for denial of merit raises which was premised upon Douglas' retaliatory treatment toward petitioners. At a minimum, had the petitioners been unable to prove compensatory damages, they would have been entitled to nominal damages for the violation of their First Amendment right to freedom of speech.

V.

The Fifth Circuit's Opinion Conflicts With Analogous Title VII Holdings.

The Fifth Circuit has recently reiterated the long-held view that "matters of compensation" in employment may constitute adverse employment actions in the realm of Title VII causes of action. See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). See also *County of Washington v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242 (1981), in which this Court confirmed that a plaintiff may bring a claim for "discriminatory undercompensation" under Title VII. By holding that the denial or reduction of merit raises does not constitute an adverse action for First Amendment purposes, the Fifth Circuit is placing the important constitutional rights of petitioners below employees' statutory rights under Tittle VII. Given the preferred status of the First Amendment this country and this Court has always maintained, this result is unsupportable. *Marsh v. Alabama, supra.*

CONCLUSION

In withdrawing its initial opinion the Court of Appeals recognized the untenability of its holding that the denial or reduction of deserved merit raises in retaliation for the exercise of free speech rights is not actionable. The Court's attempt in its revised opinion to salvage its reversal of the trial court's judgment by distinguishing between the significance of the amount of the retaliatory denials or reductions of deserved merit raises is equally untenable if the fundamental right of free speech is to receive the protection it deserves. This Court and other federal courts have consistently recognized retaliation regarding compensation as an actionable First Amendment violation. Salary discrimination is a classic example of a cognizable injury in other contexts, such as race or gender discrimination, and the First Amendment demands, at a minimum, no less protection.

For these various reasons, this petition for certiorari should be granted. If the petitioners are correct that the denial or reduction of merit raises constitutes a cognizable harm under the First Amendment, the Fifth Circuit should be reversed and the judgment rendered in favor of petitioners.

Respectfully submitted,

Beatrice Mladenka-Fowler
Counsel of Record
MLADENKA-FOWLER & ADAMS
1529 Heights Boulevard
Houston, Texas 77009

(713) 862-7349
FAX (713) -862-2979

J. Patrick Wiseman
WISEMAN, DURST,
TUDDENHAM & OWEN
1004 West Avenue
Austin, TX 78701
(713) 479-5017
FAX (713) 479-0409

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I certify that the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT has been served on the respondents by mailing it First Class U.S. Mail on the ____ day of _____, 1997 to: Mr. Renaldo Stowers, Assistant Attorney General, P.O. 12548, Austin, TX 78711-2548

_____

Beatrice Mladenka-Fowler
Counsel of Record
MLADENKA-FOWLER & ADAMS
1529 Heights Boulevard
Houston, Texas 77009
(713) 862-7349
FAX (713) -862-2979